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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

RITA GARCIA et al., Plaintiffs and Appellants, v. BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY et al., Defendants and Respondents.	2d Civil No. B178329 (Super. Ct. No. CV040017) (San Luis Obispo County)

Government Code section 11135 prohibits a state agency from discriminating on the basis of race, national origin, and ethnic group identification, among other things.[1] Recently, the Legislature has amended section 11135 a few times.

Amending a statute is like adding a room to an existing house. A successful architect must ensure that the addition be integrated into the whole. In amending section 11135, the Legislature drafted plans that call for a shower in the living room. We cannot remove the shower, but we can cap the water pipe to prevent damage to the furniture. Here we hold that the California State University is not subject to section 11135. We leave it to the Legislature to remove the shower. Its presence is anomalous, if not disquieting.

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[1] All statutory references are to the Government Code unless otherwise stated.

Plaintiffs allege that criteria for admission to the California Polytechnic University at San Luis Obispo (hereafter "Cal Poly") have a discriminatory effect on "Latino" applicants. Plaintiffs brought an action under section 11135, subdivision (a), and the regulations to title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.; hereafter "title VI"). The trial court sustained defendants' demurrer without leave to amend. We affirm the ensuing judgment.

FACTS

Rita Garcia applied for admission to Cal Poly. She was denied admission in the Spring of 2002. Garcia, other rejected applicants, a taxpayer, and a community organization (hereafter collectively "Garcia") brought this action against Cal Poly, its president, the director of admissions, the chancellor, and the Board of Trustees of the California State University.

Garcia alleged as follows: Cal Poly's admissions process employs SAT I and ACT test scores. During 2002, "Latinos" scored significantly lower than "[W]hites" and "Asian Americans" on those tests. Cal Poly also gives preference to applicants from the geographic area around Cal Poly's campus. The use of such criteria systematically discriminates against "Latino" applicants. Educational necessity cannot justify the discriminatory effect of the admissions criteria. The complaint sought declaratory and injunctive relief.

DISCUSSION

I

"A demurrer tests the sufficiency of the allegations in a complaint as a matter of law. [Citation.]" (*Mez Industries, Inc. v. Pacific Nat. Ins. Co.* (1999) 76 Cal.App.4th 856, 864.) In assessing the demurrer, we treat all facts pleaded in the complaint as true. (*Holland v. Thacher* (1988) 199 Cal.App.3d 924, 928.) But we do not assume the truth of contentions, deductions, or conclusions of law or fact. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) If upon consideration of all the facts stated plaintiff is entitled to any relief, the complaint

will stand. (*Chase Chemical Co. v. Hartford Accident & Indemnity Co.* (1984) 159 Cal.App.3d 229, 242.)

II

Garcia contends the complaint states a cause of action under section 11135. Section 11135, subdivision (a), provides: "No person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, color, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state."

Until 2001, section 11135, subdivision (a), did not expressly prohibit discrimination in any program or activity "that is conducted, operated, or administered by the state or by any state agency . . . ." Those words were added in 2001 by amendment. (Stats. 2001, ch. 708, § 1.) Prior to 2001, section 11135, subdivision (a), simply prohibited discrimination in any program or activity that is "funded directly by the state, or receives any financial assistance from the state."

Section 11139.5 requires the Secretary of the Health and Welfare Agency (hereafter "Secretary") to "establish standards for determining which persons are protected by [section 11135] and standards for determining what practices are discriminatory."

Title 22 section 98010 of the California Code of Regulations (hereafter "title 22") was adopted prior to the 2001 amendment to section 11135. Title 22 section 98010 defines "'Program or activity'" as "any project, action or procedure undertaken directly [or indirectly] by recipients of State support . . . ." The section provides, however, that "'Recipient' does not include State agencies."

Because, as defined in title 22 section 98010, the California State University is a state agency, not a "recipient[] of State support," it does not conduct a "program or activity" for the purposes of section 11135. Thus, as interpreted by

title 22, section 11135 does not apply to Garcia's claim against Cal Poly. (See *People v. Levinson* (1984) 155 Cal.App.3d Supp. 13, 20, fn. 8 [Dept. of Motor Vehicles is a state agency not subject to section 11135].)

Garcia argues that the Legislature did not delegate to the Secretary the right to determine which agencies must comply with section 11135. But such a determination comes within the Secretary's power to establish "standards for determining what practices are discriminatory." (§ 11139.5.)

Garcia also relies on the 2001 amendment to section 11135, which expressly prohibits discrimination in any program or activity conducted by the state or any state agency. She argues the statutory amendment conflicts with, and therefore supersedes, the regulations adopted in title 22 section 90810.

But the 2001 amendment must be viewed in light of section 11000, subdivision (a). Section 11000, subdivision (a), provides in part: "As used in any section of this title that is added or amended effective on or after January 1, 1997, 'state agency' does not include the California State University unless the section explicitly provides that it applies to the university."

Because the 2001 amendment did not expressly provide that a state agency includes the university for purposes of the section, there is no conflict with title 22, and Cal Poly is not subject to section 11135, subdivision (a).

Garcia points to an amendment to section 11135, enacted in 2003. The 2003 amendment relates to an amendment in 2002. The 2002 amendment added subdivision (d) to section 11135. (Stats. 2002, ch. 1102, § 2.5.) Section 11135, subdivision (d), seeks to improve accessibility of existing technology to persons with disabilities. It requires state governmental entities to comply with the accessibility requirements of federal law. Section 11135, subdivision (d), however, does not expressly include the California State University. In 2003, the Legislature again amended section 11135 to add subdivision (c)(2). (Stats. 2003, ch. 784, § 1.)

Section 11135, subdivision (c)(2), provides in part: "The Legislature finds and declares that the amendments made to this act are declarative of existing

law. The Legislature further finds and declares that in enacting [the 2002 amendment adding subdivision (d)] it was the intention of the Legislature to apply subdivision (d) to the California State University in the same manner that subdivisions (a), (b), and (c) of this section already applied to the California State University, notwithstanding Section 11000."

Garcia argues that section 11135, subdivision (c)(2), shows the California State University is subject to subdivision (a). But the purpose of subdivision (c)(2) is not to create new law in the application of subdivision (a). Its stated purpose is to clarify that subdivision (d) applies to the California State University, notwithstanding section 11000.

Section 11135, subdivision (c)(2)'s reference to subdivision (a) gives us pause. But subdivision (a) has never been applicable to the California State University, and subdivision (c)(2) expressly states that the amendments to the act are "declarative of existing law." Under the circumstances, the Legislature's faulty assumption that subdivision (a) "already applie[s]" to the university is too frail to support an expansion of subdivision (a). This is one of those statutes in which we are near certain what the Legislature meant, even though that is not what it said. It is not a pleasant job, but someone has to do it. We conclude that section 11135, subdivision (a), does not apply to Cal Poly.

Nor does section 11135, subdivision (a), apply to Garcia's claim against the individual defendants. Title 22 section 98010 defines a "'Recipient'" as "any contractor, local agency, or person, who regularly employs five or more persons . . . ." Garcia does not allege that any of the individual defendants regularly employ five or more persons.

III

Garcia contends that she stated a cause of action under the regulations to title VI.

Section 601 to title VI (42 U.S.C. § 2000d) prohibits discrimination on the ground of race, color, or national origin under any program or activity

receiving federal financial assistance. Section 602 to title VI (42 U.S.C. § 2000d-1) authorizes federal agencies to "effectuate the provisions" of title VI section 601 by issuing regulations.

Alexander v. Sandoval (2001) 532 U.S. 275, rejected the argument that regulations issued pursuant to title VI section 602 give rise to a private right of action to enforce claims of disparate impact discrimination. The court pointed out that title VI section 601 prohibits only intentional discrimination. (*Id.* at p. 280.) It further concluded there is no evidence to suggest Congress intended to create a private right to enforce regulations promulgated under title VI section 602. (*Id.* at p. 291.) In so concluding, the court stated: "[I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice, but not the sorcerer himself." (*Ibid.*)

Garcia characterizes *Alexander* as a "standing case." She claims that although private parties may not have standing under federal procedure, Code of Civil Procedure section 526a gives California taxpayers standing to bring a cause of action under the regulations to title VI.

Code of Civil Procedure section 526a provides in part: "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein."

Code of Civil Procedure section 526a creates no substantive rights in a taxpayer. (See *Howard Jarvis Taxpayers' Assn. v. Board of Supervisors* (1996) 41 Cal.App.4th 1363, 1378 [where plaintiff fails to allege a violation of law, there is no basis for an action to restrain an illegal expenditure].) *Alexander* makes clear that Congress did not intend to give a private party any substantive right to a cause of

action alleging disparate impact discrimination. It also makes clear that title VI regulations cannot give a substantive right that Congress did not intend. Contrary to Garcia's argument, *Alexander* is not simply about standing. Lacking a substantive right, Code of Civil Procedure section 526a does not assist Garcia.[2]

The judgment is affirmed. Costs on appeal are awarded to respondents.

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GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

[2] Code of Civil Procedure section 526a on its face applies to expenditures by a "county, town, city or city and county." We need not decide here whether it also applies to state expenditures. (See *Blair v. Pitchess* (1971) 5 Cal.3d 258, 268, stating in dicta that it has been held Code of Civil Procedure section 526a applies to expenditures of state funds.)

Roger T. Picquet, Judge

Superior Court County of San Luis Obispo

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Thomas A. Saenz, Victor Viramontes and Mexican American Legal Defense and Education Fund for Plaintiffs and Appellants.

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